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UniFirst Corporation and Robert A. Fusillo and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC, Local 1324-15. Case 06-RD-097418

July 15, 2014

DECISION AND DIRECTION

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA
AND JOHNSON

The National Labor Relations Board, by a three-member panel, has considered objections to an election held June 13, 2013, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 69 for and 70 against the Union, with 3 challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs and has adopted the hearing officer's findings¹ and recommendations² only to the extent consistent with this Decision and Direction.

The hearing officer recommended sustaining the Union's Objections 1 and 2, alleging that the Employer engaged in objectionable conduct by promising employees 401(k) and profit-sharing plans if they decertified the Union. We adopt these recommendations for the reasons stated by the hearing officer.³

¹ The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We have carefully examined the record and find no basis for reversing the findings.

Because we adopt the hearing officer's findings that the Employer engaged in objectionable conduct by promising employees a 401(k) plan and profit-sharing plan if they decertified the Union, we find it unnecessary to pass on the hearing officer's finding that the Employer also engaged in objectionable conduct by stating that the employees' existing pensions would be frozen if the Union was decertified, as this statement was not alleged to be objectionable.

² In the absence of exceptions, we adopt pro forma the hearing officer's recommendations to overrule the challenge to the ballot of Michael Koscianski, and to overrule the Union's Objs. 3, 4, and 5.

³ In adopting the hearing officer's recommendation to sustain the Union's Objs. 1 and 2, alleging that the Employer promised employees a 401(k) and a profit-sharing plan if they decertified the Union, we find, contrary to our dissenting colleague, that the Employer's statements went beyond the statements of historical fact that the Board found were not objectionable in *TCI Cablevision*, 329 NLRB 700 (1999) (statements about 401(k) plan's terms and eligibility requirements), and *Viacom Cablevision*, 267 NLRB 1141 (1983) (comparisons of pay and benefits at various facilities). Here, neither the Employer's handbook

The hearing officer also recommended overruling the challenge to the ballot of employee Michael Koscianski; there are no exceptions to this recommendation. Regarding the other two challenged ballots, those of William Shaner Jr. and Andy Mohammed, the parties stipulated that Shaner and Mohammed were terminated 3 days before the election, that there are pending grievances concerning their terminations, and that the parties will notify the hearing officer of the resolution of these grievances within 3 days of their resolution. Awaiting the outcome of those pending grievances, the hearing officer did not rule on the two challenges.

Even though the challenges to Shaner's and Mohammed's ballots were not resolved, the hearing officer recommended setting aside the results of the election and directing a second election once their status was determined in the grievance procedure.

Subsequent to the issuance of the hearing officer's report, the Board was administratively informed that the grievance regarding Mohammed was withdrawn by the Union.

Although we agree with the hearing officer's recommendation to sustain the Union's Objections 1 and 2, we find that a direction of a second election is premature. The proper procedure is to resolve the status of the chal-

(on which our colleague relies), nor any other evidence shows that, as in *TCI Cablevision*, the Employer was required under its plans to automatically cover employees if they decertified the Union. Indeed, the handbook's statement reserving to the Employer the discretion to modify or terminate the retirement plans weighs against a finding that the benefits were automatic. Moreover, rather than merely describing "the automatic result of non-represented status under the pre-existing terms of those benefit plans," as our colleague contends, the evidence shows that the Employer specifically linked the receipt of the 401(k) and profit-sharing plans to voting against the Union in the upcoming decertification election. In particular, we note that the Employer's senior vice president, Michael Croatti, told employees to trust him, vote no, and take their union dues and put them into the Employer's 401(k) plan. And in describing the Employer's profit-sharing plan, Croatti characterized it as "free money" and the Employer's general manager, James Lang, told employees that they could get in on the plan by "voting no basically." We agree with the hearing officer that the Employer's statements are objectionable because they would lead employees to reasonably believe that the Employer was promising these benefits if they decertified the Union. See *G & K Services*, 357 NLRB No. 109 (2011) (finding an implied promise of a new benefit from statement that employees at another facility received the benefit shortly after decertifying the union). Further, and also contrary to the dissent's contention, the hearing officer properly found that the Employer's disclaimers (i.e., stating that the benefits are not guaranteed) were inadequate. See *id.*, *supra*, slip op. at 3 quoting *Michigan Products*, 236 NLRB 1143, 1146 (1978), "it is well settled that such [disclaimers are] immaterial . . . if in fact [an employer] expressly or impliedly indicates specific benefits will be granted."

Member Hirozawa expresses no view on whether *TCI Cablevision*, *supra*, was correctly decided. He agrees, however, that it is distinguishable from the present case.

lenged ballots before determining whether the election should be set aside. See, e.g., *Pay N' Save Stores*, 291 NLRB 979, 979 (1988). Therefore, rather than directing that a second election be held, we shall remand the case to the Regional Director to await the resolution in the pending grievance proceeding regarding Shaner's termination. If, upon resolution of the challenge to his ballot, his vote and that of Koscianski are determinative, the Regional Director shall open and count the ballots and issue a revised tally. If the revised tally of ballots shows that the Union received a majority of the eligible votes, the Regional Director shall issue a certification of representative. Alternatively, if the revised tally or the resolution of the remaining challenged ballots shows that the Union has not prevailed in the election, the election shall be set aside and a second election shall be directed. See, e.g., *Pine Shores, Inc.*, 321 NLRB 1437, 1437 (1996); *Skyline Builders, Inc.*, 340 NLRB 109, 109–110 (2003).

DIRECTION

IT IS DIRECTED that the case is remanded to the Regional Director for Region 6 for further appropriate action consistent with this Decision and Direction.

Dated, Washington, D.C. July 15, 2014

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER JOHNSON, dissenting.

I would overrule the Union's Objections 1 and 2, which allege that the Employer engaged in objectionable conduct by promising employees a 401(k) plan and a profit-sharing plan if they decertified the Union. The Employer did no more than truthfully describe to employees the benefits it currently made available to its unrepresented employees.¹

Here, as found by the hearing officer, the Employer informed employees—in the give and take of voluntary employee meetings—about the benefit plans it offered to unrepresented employees. Although the plans are not in evidence, the Employer's handbook describes the “Re-

¹ I would also find that the hearing officer erred in finding that the Employer engaged in objectionable conduct by stating that the employees' existing pensions would be frozen if the Union was decertified as this statement was not alleged to be objectionable. Accordingly, after the challenged votes are resolved, I would issue an appropriate certification.

irement Savings Plan.”² Under that heading is a statement to the effect that the employee—as a nonunion “team partner”—would be eligible for the Employer's retirement savings plan “on the day following 90 consecutive days of employment.” The handbook outlines and discusses the three parts of the plan—the profit-sharing contributions made by the employer,³ the employee's eligibility to contribute to the 401(k),⁴ and the employer's match of the employee's contributions to the 401(k).⁵ The hearing officer credited the testimony of the Employer's witnesses that they told employees that the retirement benefits could not be guaranteed.

In these circumstances, I conclude that the Employer simply informed employees of the “historical facts” regarding benefits that were available to unrepresented employees. Indeed, contrary to my colleagues, I believe that the employee handbook in the record unequivocally shows that employees would automatically be eligible for these benefits, by the terms of the Retirement Savings plan, subject only to length of service requirements applicable to all nonunit employees. The fact that the Employer has the authority to modify or terminate retirement benefits for *all* covered employees is irrelevant. Such a reservation of rights is commonplace in employee benefit plans. There is no evidence whatsoever that the Employer has or would choose to exercise discretion to

² Emp. Exh. 16A.

³ The handbook states, in relevant part:

Profit sharing contributions are made solely by UniFirst. Each Team Partner receives a percentage of profits based on their earnings, which is deposited into an account in their name. Because these contributions are discretionary, they may vary from year to year.

To receive a Company profit sharing contribution, a Retirement Savings Plan member must (1) be employed before the start of a calendar year, (2) be paid for at least 1,000 hours of service during the Plan year, and (3) be employed at the end of the calendar year.

You do not have to participate in the 401(k) part of the Retirement Savings Plan to receive profit sharing.

The Company profit sharing money is 100% yours (you become vested) after three years of service (2007 contribution and after).

⁴ The handbook states, in relevant part:

This is a voluntary program where you may elect to contribute a portion of your earnings for retirement.

....

You may begin to contribute to the 401(k) at any time after you become eligible for the Retirement Savings Plan.

....

You are always 100% vested in your contributions.

⁵ The handbook states, in relevant part:

UniFirst matches your 401(k) contribution dollar-for-dollar up to the first 3% of your pay, and 50 cents on the dollar for the next 2% of your pay.

You are immediately 100% vested in the 401(k) matching contributions.

change eligibility requirements, change vesting rights, or deny coverage to any *subgroup* of nonunit employees. What matters is that the Respondent accurately described the benefits presently provided to all nonunit employees. My colleagues' reliance on the Employer's discretion to change benefit plans in the future would effectively eliminate the right to inform employees about such plans prior to a decertification election.

Thus, this case is closer to *TCI Cablevision*, 329 NLRB 700 (1999), and *Viacom Cablevision*, 267 NLRB 1141 (1983), than to *G & K Services*, 357 NLRB No. 109 (2011)—on which the majority relies. As in *TCI*, the Employer here made representations about the benefits available to unrepresented employees. An employer has the right to compare benefits at its unorganized facilities with those in place for employees in a similar facility with union representation. Under the animating principles that lay behind Section 8(c) of the Act, a mere statement of fact should not give rise to an objection. As in *TCI* and *Viacom*, the Employer here advised the employees that it could not make promises or guarantee benefits. The Employer's disclaimers in this case were substantially similar to the employer disclaimers in *TCI* and *Viacom*. Unlike my colleagues and the hearing officer, I see no reason to discount the Employer's disclaimers that it could not guarantee anything to employees.

In *G & K Services*, supra, a Board majority found that an employer—prior to a decertification election at its Portsmouth, Virginia facility—“expressly linked” the extension of benefits at another of its facilities to the fact that the employees at the other facility had voted to decertify the union at that facility. There is no such linkage in this case, because it was explained to employees that the benefit eligibility was an automatic result of nonunion status. Contrary to my colleagues, impermissible “linkage” cannot occur where an employer is simply describing, however colloquial its verbiage, the logical outcome that employees deciding to become unrepresented will then result in particular benefits eligibility, where

that is the automatic result of nonrepresented status under the preexisting terms of those benefit plans. The employer in this situation is not promising anything, but simply explaining an “if/then” outcome under benefits plans *already in place*, as part and parcel of its explanation of what those historical benefits plan terms were. In contrast, in *G & K*, it was clear the employees did *not* know the terms of the benefits plans that the employer referenced. See *G & K*, 357 NLRB No. 109, at 1 (“There is no evidence, however, that the Portsmouth employees were aware of these circumstances.”) Thus, *G & K* employer's statement about employees now being “able to sign up for health insurance that covers their spouses and children for the first time ever,” once they had voted against union representation, see *id.*, thus resembled an implied promise of extending some kind of new benefits eligibility to employees in exchange for a “no” vote. In addition, while I find *G & K* factually distinguishable, as noted, I agree with Member Hayes' dissenting view that the employer statements at issue there were not objectionable.

Ultimately, under the general principles behind Section 8(c) and the First Amendment, an employer should be free to describe the wages, benefits, and working conditions offered at its unionized facilities and its nonunionized facilities. Employees should be armed with the facts when they vote. As in *TCI* and *Viacom*, the Employer here informed employees of the facts regarding what benefits it currently made available to its unrepresented employees and the difference with what it made available to represented ones—but it also advised that it could not guarantee what would happen in the future. I would not find any objectionable promise of benefits.

Dated, Washington, D.C. July 15, 2014

Harry I. Johnson, III,

Member

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